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CONSTITUTION MAKING IN EARLY INDIANA: AN HISTORICAL SURVEY

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(Read at the recent conference on the need of a Constitutional Convention, held at Indiana University, June 8, 9, 10.)

On the first Monday in December, 1815, the General Assembly of the Indiana territory met at Corydon. Governor Posey was ill at Jeffersonville and he could not come to the seat of government. He sent a brief message by his private secretary, calling attention to the tide of immigration that was flowing into the territory and the Governor urged upon the legislators, as of first importance, 'the promotion of education and the betterment of roads and highways.' This Assembly passed thirty-one laws and seven joint resolutions, but its chief interest centered in the efforts to change their territorial institutions for those of a State government. On December 14, 1815, a memorial was adopted by the Assembly and laid before Congress on the 28th of the same month by Jonathan Jennings, Indiana's territorial delegate, praying Congress to order an election to be held in the several counties of the territory for representatives to meet in convention on a day to be appointed. The memorial called attention to the fact that the Ordinance of 1787 for the government of the territory, had provided that 'whenever there shall be 60,000 free inhabitants therein, this territory shall be admitted into the Union on an equal footing with the original States.'

The memorial also set forth that from a recent territorial census, the number of free white inhabitants was above 60,000. It was requested that if a convention were authorized the majority of the delegates elected thereto should determine whether it were expedient

to go into a State government, and if it were deemed expedient the convention so assembled should have the power to form a constitution and frame of government, or to provide for the election of a later convention for that purpose. In this memorial the Assembly expressed its attachment to the principles concerning 'personal freedom and involuntary servitude' which had been laid down in the Ordinance of 1787 for the government of the Northwest territory.

This memorial was referred to a committee of which Mr. Jennings was chairman. On the 5th of January, 1816, Jennings reported to the House a bill to enable the people of Indiana territory to form a constitution and State government, and for the admission of the State to the Union on an equal footing with the other States. The bill, after a few amendments, was passed by Congress, and became a law by the approval of President Madison on the 19th of April, 1816. This was the Enabling Act for Indiana.

In harmony with the provisions of this act an election was held in the several counties of the territory on May 13, 1816, for members of a convention to form a State constitution. There were thirteen counties in the State and they elected forty members to the convention. From Wayne, there was Joseph Holman; from Franklin. William H. Eads and James Noble; from Jefferson, David H. Maxwell; from Clark, Jonathan Jennings and Thomas Carr; from Washington, John DePauw and William Lowe; from Knox, John Badollet, Wm. Polke and Benjamin Parke; from Gibson, Alexander Devin and Frederick Rappe. There were other men, but these are a few of the best known names.

The convention began its sessions at Corydon, June 10, 1816, and continued to meet from day to day until the 29th of June. In nineteen days it completed its work and adjourned.

Jonathan Jennings was president and Wm. Hendricks was secretary. Badollet, of Knox was chairman of a committee to prepare a preamble and a bill of rights. John Johnson, of Knox, was chairman of the committee on the distribution of governmental powers. Noble, of Franklin, was chairman of the committee on the legislative department. Graham, of Clark was chairman of the committee on the executive department. Scott, of Clark, was chairman of the committee on the judicial department. Dill, of Dearborn, was chairman of the committee on impeachment. Maxwell, of Jefferson, was chairman of the committee to consider other provisions of the constitution not included in the foregoing topics.

There were also committees on the mode of revising the constitution, on education, the militia, the franchise, and prisons.

John B. Dillon in his well known *History of Indiana* (page 559) says:

> The convention that formed the first constitution of the State of Indiana was composed, mainly, of clear-minded, unpretending men of common sense, whose patriotism was unquestionable, and whose morals were fair. Their familiarity with the American Independence—their territorial experience under the provisions of the Ordinance of 1787—and their knowledge of the principles of the Constitution of the United States, were sufficient, when combined, to lighten materially their labors in the great work of forming a constitution for a new State. With such landmarks in view, the labors of similar conventions in other States and territories have been rendered comparatively light.
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> In the clearness and conciseness of its syle, in the comprehensive and just provisions which it made for the maintenance of civil and religious liberty, in its mandates, which were designed to protect the rights of the people, collectively and individually, and to provide for the public welfare—the constitution that was formed for Indiana, in 1816, was not inferior to any of the State constitutions which were in existence at that time.

The constitution of 1816 was not submitted to the voters of the State for ratification. That step in popular government was not deemed necessary. By the provisions of the constitution the officers of the territorial government were required to continue in the exercise of their duties till they should be superseded by the officers elected under the authority of the State government. The president of the constitutional convention, Mr. Jennings, was required to issue writs of election directed to the sheriffs of the several counties requiring them to cause an election to be held for governor, lieutenant-governor, representative in Congress, members of the General Assembly and sheriffs and coroners of the counties, which election was to be held on the first Monday in August, 1816. Here was a comparatively short ballot—a governor, lieutenant-governor, congressman, and two county officers. All other officers were appointive. Jennings was elected governor, receiving 5,211 votes to 3,934 votes cast for his competitor, Thomas Posey, who was at the time governor of the territory. Christopher Harrison, of Washington county, was elected lieutenant-governor, and William Hendricks was elected to represent Indiana in Congress.

The General Assembly elected in August, commenced its session at Corydon on November 4, 1816. On November 7th the oath of office was administered to Governor Jennings and Lieutenant-Governor Harrison, and the Governor delivered his inaugural address.

Thus, on the 7th of November, 1816, the territorial government of Indiana was superseded by a State government, and on December 11, the State by a joint resolution of the two houses of Congress was formally admitted to the Union of States.

A comparison of this first constitution of Indiana with that of Kentucky adopted in 1792 and that of Ohio adopted in 1803, will show how largely Indiana's fundamental law was fashioned after these two instruments of her sister States. Many parts are appropriated bodily, and it is easily seen that the new State came offering a constitution that had been largely modeled after some approved democratic pattern. All that the convention could reasonably be expected to do was to fit some ready-made pattern to our local needs. That is what they did, as a reading of the Kentucky and Ohio constitutions will show. They evolved little that was new. Their principles of government were well known principles; they were old and established. There were good, hard-headed, common-sense men in the convention, but there were no great creative political geniuses. They could not, or did not, take time to create a constitution *de novo*. They seemed to be in a hurry, though they worked for an age much slower-moving than ours. It may be recalled as an evidence of the haste, not to say the snap judgment, that was exercised in the process of making our first constitution and putting our State government into operation, that the Enabling Act was passed on April 19, the election of delegates was held on May 13 in less than four weeks; the delegates came together on June 10, four weeks later; they deliberated less than three weeks; and the constitution which they devised was not passed upon by the people at all. Naturally, the men of the convention appropriated to their use constitutional provisions already made and provided, and in so doing they acted the part usual to Anglo-Saxon constitution makers.

It has been said that the parties in political control were hurrying to bring the State into the Union before snow flew, or before the fall elections. O. H. Smith in his *Early Indiana Trials and Sketches* says that the affairs of the State were in the hands of three parties, or rather one party with three divisions, the Noble, Jennings, and Hendricks divisions. All were represented in the convention of 1816. Noble and Jennings were delegates, Jennings being the president, and William Hendricks was the convention's secretary. This was a time of 'personal politics' and an arrangement was made among these leaders and their friends to make Noble senator, Jennings governor, and Hendricks congressman. In their readiness to divide

these political plums among themselves, these leaders were naturally inclined toward dispatch, that the State might be ready for acceptance for the fall session of congress.

This was a period of the complete dominance of Jeffersonian Democracy,and constitutions were becoming more popular and flexible Jefferson was on record as favoring a State's changing its constitution at least once within every generation. He thought a change once in twenty years might not be too often.

Somewhat in harmony with this, and it would seem in even a more liberal spirit, the constitution of 1816 provided that 'every 12th year after the constitution went into effect, at the general election held for governor, there shall be a poll opened in which the qualified electors of the State shall express by vote whether they are in favor of calling a convention or not; if there should be a majority of all the votes given at such election in favor of a convention, the governor shall inform the next General Asembly thereof, whose duty it shall be to provide by law for the election of members to the convention, the number thereof, and the time and place of meeting; which law shall not be passed unless agreed to by a majority of all the members elected to both branches of the General Assembly.' When the convention met it should have the power to revise, amend, or change the constitution—except that the constitution should 'never be altered in such a way as to authorize slavery, as that relation can originate only in usurpation and tyranny.'

So it appears that our fathers were starting off with the expectation of frequently meeting in convention to revise their State constitution. It was thirty-four years before a constitutional convention assembled again in Indiana—probably a longer period than was anticipated by the framers of the first instrument. We have been sixty-four years—almost twice as long—on the second run, in a period of much greater change.

The constitution of 1816 had not been long in operation until dissatisfaction began to arise under it. From 1830 to 1848 repeated quarrels arose between the State senate and the chief executive over the appointment of the supreme court judges, and after some abuses in appointments had occured, it was felt that it would be better if the choice of the judges were left to election by the people. But the chief ground of difficulty seemed to lie in the lack of general laws under which local needs could be met and administered. The General Asembly had constantly to be passing laws in response to some local or personal demand until the local laws became six or seven times

more voluminous than the general laws. Divorce was then entirely a matter for legislative action. There were numerous local and special acts. To illustrate I shall name two instances among many—one for the relief of James Hardin, of Warrick county, authorizing 'said Hardin to peddle and sell goods of any kind whatever without paying license thereof in any county in the State,; and one for the relief of Silas Overman, of Grant county, against whom a court had given a judgment of $238.00 on a surety bond. This judgment of the court was, in effect, to be submitted to a referendum in Overman's township to see whether the voters would recall the judicial decision and remit the judgment—an application of the recall which no one in recent times has ever ventured to suggest or defend. Many of the special acts were to incorporate towns and improve roads, there being no general provision for such purposes, and the constitution not requiring that the laws should be uniform for the whole State.

The General Assembly at every session was constantly being beset to pass hundreds of such personal and local acts. The evil was found to be unbearable, and there began to be a pressing demand for a new constitution to remedy the situation. There were other needs but this acted most effectively.

A referendum similar to the one we are now confronting was provided in 1849. In his annual message delivered to the houses of the General Assembly on December 6, 1848, Governor James Whitcomb recommended the passage of an act providing for submitting to the people of the State the question of calling a constitutional convention to amend the constitution of 1816. The governor gave a number of reasons for urging this step: (1) The growing burden of local and private legislation. (2) The increasing demand for biennial instead of annual sessions of the General Assembly. (3) The necessity of prescribing restrictions on the creation of public debt. (4) The desirability of requiring a two-thirds vote in each house in appropriating public funds to private individuals. (5) The universal desire for amendment.

The time was thought to be propitious, as the question would not be complicated by the excitement of a national election. Governor Whitcomb especially emphasized the importance of calling a halt upon the increasing amount of local and private legislation. For five years the amount of general legislation had remained stationary while in the same period legislation of a local and private character had grown by 350 per cent. In the last session of the Assembly

over 600 bills had passed, being more than four for each member and more than thirteen for each working day of the session. To examine thirteen bills every day for six or seven consecutive weeks seemed like an unreasonable task for the mind of the average legislator, not to speak of the governor, who was expected to examine personally all of them before signing. The task became a physical impossibility, since many of these bills piled up within the few days before the close of the session.

An act approved on January 15, 1849 provided that at the regular State election in that year, then held in August, the people might decide for or against the calling of a convention, to alter, revise, or amend the constitution of the State. Every qualified voter might vote for or against the proposition. The act provided that when a voter presented his ballot for State and local officers, at his proper voting place, the inspector of election was required to propose to him the question, 'Are you in favor of a convention to amend the constitution?' Those favoring such convention should answer in the affirmative, those against in the negative, and the answers were to be duly recorded by the clerks of election in a poll book furnished for that purpose. The inspectors and judges were to certify the number of votes for and against the convention to the clerks of the circuit courts under the same restrictions and penalties that votes for State and county offices were given and certified. These clerks were to certify to the secretary of State, subject to penalties for neglect, and the secretary of State was to lay the returns before the General Assembly. The county sheriffs were required to give six weeks' notice of this election in every county.[1]

It thus appears that this law provided that the responsible election officer should put it up directly to every voter who presented a ballot to say whether or not he favored a convention. This provision led to a large vote upon the subject, almost as large as that cast for State officers. Yet in spite of this laudable effort to induce the voters to express themselves, more than 10,000 who voted for governor failed to express themselves upon the issue of the convention. It turned out fortunately that a majority of all the votes cast in the election were for the convention, though the law did not require that it should be so before a convention might be called. The total vote cast on the question of the convention was 138,918, with 81,500 votes *for* and 57,418 votes *against*, giving a majority in favor, on the convention vote, of 24,082. In the State campaign both of the leading candidates for governor, Joseph A. Wright, Democrat,

[1] *State Laws*, 1848-9, p. 36.

and John A .Matson, Whig, declared themselves in favor of the convention. There seemed to be a positive desire among the people for a change in the organic law, while there was no organized or active opposition. In the August election, 1849, Joseph Wright, of Rockville, Democrat, received 76,996 votes. Mr. John A .Matson, of Brookville, Whig, received 67,218 votes, and Mr. James H. Cravens, the Free Soil candidate, received 3,018 votes, making a total vote for governor of 147,232, with one county (Fayette) unreported on the governorship vote. A majority of the governorship vote was 73,617. The convention vote was about 8,000 above this majority. The difference between the vote on the governorship and that on the convention was a little over 10,000. That is, about 7½ per cent of the voters did not express themslves on the convention, though they were specifically asked by the election officers to do so. The surmise is that some voters obstinately refused to express themselves. If we have 650,000 voters in Indiana this year on the United States senatorship which is a fairly conservative estimate, as there are over 750,000 voters enumerated, and the proportion not voting on the convention should merely equal that of 1849 (though it is likely to exceed it), we shall find that about 50,000 voters will fail to express themselves. If these voters vote for a United States senator but not on the convention one way or the other, they will be counted in the negative, since the act referring the question to the voters requires an absolute majority of all voting before the convention is authorized. Of course the General Assembly might still call a convention regardless of the vote, but is is not likely to do so.

It does not appear that in the referendum of 1849 there was much public discussion of the subject before the people. The people were not stirred up over the question. There were no university conferences, or popular mass meetings on the subject, no franchise leagues or other organizations to press the matter on the attention of the voters, nor did the newspapers seem at all interested in the matter. I have gone through the files of the *Indiana Journal* for several weeks preceding the election without succeeding in finding a single reference to the pending proposal. Marion county voted against the convention by 347 majority, and the Democratic *Sentinel*, of Indianapolis, charged that the reason for this was that the Whig leaders were notoriously hostile to the measure and openly threw the weight of their influence as well as most of their votes against it. Mr. Defrees, the Whig editor of the *Journal*, denied this. He himself voted for the convention, and the truth was, he asserted, that very little interest was manifested on the question by any one, and many of those who

were asked by the inspectors, 'Convention or No Convention,' then heard of the proposition for the first time.[2] Defrees claimed that as many Whigs voted for the convention as did Democrats and returns by counties seem to bear him out. The fact was that many Whig counties voted for the convention and many Democratic counties against it, and *vice versa*. The strong Whig county of Wayne voted almost 3 to 1 for the convention, and Randolph 2 to 1, and Henry gave a decisive convention majority. Clarke, Sullivan and Washington equally strong Democratic counties, gave almost equally heavy convention majorities. Sullivan, which went for Wright for governor by a vote of 3 to 1, voted for the convention by 2 to 1. On the other hand, the Whig county of Jefferson which went for Matson by 500 majority gave also 500 majority against the convention. The voting seems to have been governed by local interest and local sentiment, not by politics nor party favor.

But since the proposal for a convention in 1849 had carried a majority of all the votes cast, the duty of the General Assembly was plain. Within the year, 1849, Governor Whitcomb had been elected to the United States Senate and the lieutenant-governor, Paris C. Dunning, had succeeded to the governorship. In his message of December 4, 1849, Governor Dunning called the attention of the General Assembly to the duty before it. This duty was to provide by law for districting the State for the election of convention delegates. Governor Dunning advised (at least publicly) that the members of the General Assembly should divest themselves of all party predilections and make a fair apportionment as a means of assuring a fair representation in the convention whose duty it would be to draw up a new constitution, and this, the governor thought, would be an initiatory step which would tend to predispose the people to adopt a new constitution when offered for their ratification. In this General Assembly the Democrats had a safe working majority with 29 senators and 59 members of the House. A bill to provide for the election of delegates to a constitutional convention was introduced in the Senate on December 4, 1849, by Mr. Randall. It passed the Senate on January 3, 1850, and the House on January 11, and was approved by the governor on January 18, 1850.

The act provided that an election for delegates to the convention should be held on the first Monday in August. The convention was to be competent to consider the constitution of the State, to make such changes or amendments as it might think proper, which amendments should afterwards be submitted to a vote of the people

[2] *Weekly Indiana State Journal*, August 27, 1849.

of the State, to be ratified or rejected. The delegates were to be elected as the members of the General Assembly were elected and in corresponding districts, the usual election officers, laws, processes, and penalties to apply. The county sheriffs were to attest elections to the secretary of State. The delegates numbered the same as the members of the Assembly. The delegates were to assemble on the first Monday in October, 1850, in Indianapolis, for organization by electing a president and other officers. The secretary of State was to attend and open the convention, call the lists of districts and counties, receive the credentials and perform such duties in organization as are performed by the proper officers when the General Assembly is organized.

The delegates to this convention were elected at the regular State election on August 6, 1850. The two parties put out their candidates and their names appeared on the party tickets with the other party candidates. One hundred and fifty delegates were elected, fifty senatorial delegates and one hundred representative delegates. Of the fifty senatorial delegates, thirty-three were Democrats, and seventeen were Whigs; of the one hundred representative delegates sixty-two were Democrats and thirty-eight were Whigs. In the convention as a whole there were ninety-five Democrats and fifty-five Whigs.

By the provisions of the act creating the convention its members when they asembled were required to take an oath to support the constitution of the United States and to perform faithfully the duties of their office. The powers and privileges of a legislative body were conferred upon this convention. A majority constituted a quorum to do business. The members were to receive $3.00 per day while actually attending, and an allowance for legislative mileage.

The convention assembled on October 7, 1850. It completed its labors on February 10, 1851, making one hundred and twenty-six days in all, counting Sunday and holidays.[3]

The *State Journal* of October 7, 1850, spoke highly of the personnel of the convention, commending the character and spirit of the delegates, and predicting that they would perform their duties in such a way as to protect the rights and promote the prosperity and happiness of the people of the State. Of the men of the convention, we may recall a few: Horace P. Biddle, Cass and Howard; J. G. Reed, of Clark, W. S. Holman, of Dearborn; P. M. Kent, of Floyd; John

[3] The late Michigan convention of 1906-7 consumed 122 days in all, from October 22 to February 21. At different times after the convention of 1851 had adjourned the local Whig meetings and organs repeatedly condemned the "Democratic constitutional convention," as they called it, for "protracting its sittings and expending huge quantities of public money." *Indiana State Journal*, July 7, 1851, and March 6, 1852.

Zenor, of Harrison; Milton Gregg, of Jefferson; Geo. W. Carr, of Lawrence; J. F. Carr, of Jackson, his brother (the father of these Carrs was in the convention of 1816); T.D. Walpole, of Madison; A.F. Morrison, of Marion; Daniel Read, of Monroe and Brown (a professor of the University, and one of the ablest and most useful men of the convention); O. P. Davis, of Parke and Vermillion; Thos. A. Hendricks, of Shelby; John I. Morrison, of Washington; Joseph Risrine, of Fountain; William M. Dunn, of Jefferson; D. Maguire and D. Wallace and R. D. Owen, of Marion; A. P. Hovey, of Posey; Schuyler Colfax, of St. Joseph.

When the convention had completed its work it recommended. and the General Assembly then sitting provided, that it should be submitted to the people for ratification or rejection at the usual election time, the first Monday in August, 1851. The voters were called upon to express themselves on two propositions: (1) The ratification or rejection of the instrument as a whole. (2) The adoption or rejection of a separate article relative to negro exclusion and colonization—a question submitted to the voters as a distinct proposition in the following form: Exclusion and colonization of negroes and mulattoes, 'Yes' or 'No.'

The proposed constitution was printed in full in the leading papers of the State and discussed with considerable interest during the five months preceding the vote. The *State Journal*, of Indianapolis, one of the leading Whig organs of the State, said that while the new constitution contained much that was objectionable, it would still pledge support to all its provisions except the negro exclusion clause. The *Madison Courier*, a strong Democratic organ, regarded the new constitution as 'immeasurably above the one now in force.'

At the regular election, August 4, 1851, the constitution was adopted by a vote of 113,230 to 27,638. There were 113,828 votes cast in favor of negro exclusion to 21,873 against.

By its own provision the constitution went into operation on November 1, 1851.

The vote for the constitution was decisive, not to say overwhelming. In his message to the General Assembly on December 2, 1851, Governor Joseph A. Wright expressed the conviction that 'as Indianians we may well challenge a parallel in the unanimity with which our people adopted the new constitution—a majority of 86,000 at the ballot box.' He urged the General Assembly to give the constitution 'a steady and energetic support' and carry out its various provisions, 'that they may be fairly tested.'[4]

[4] *House Journal*, 1851, p. 15.

The scope of this paper and the time allotted for it will not permit me to go into detailed account of the efforts made to amend the Indiana constitution since 1851. But a few of the leading efforts in this direction should not be entirely omitted.

The new constitution had hardly gone into effect before proposals were made in the General Assembly to amend it—to restore annual legislative sessions, to require full naturalized citizenship of all foreign-born voters, to lift the sixty-day limit on legislative sessions, to allow special and local laws for the support of common schools. Such proposals were frequently made between 1853 and 1857. As early as 1859 efforts were made in the General Assembly to bring about a new convention, or, failing in this, to secure a series of amendments on the ground that provisions of the constitution made legislation under it 'difficult, tedious, and in some respects impossible, or at least inadequate to the emergencies of the case or to the wants of the citizens of the State, restricting remedies that would tend to the public good.' The vote in the General Assembly in 1859 showed that there was a popular demand for a revision, and those who opposed the new convention as the best method of bringing about the desired changes admitted that changes were desirable. One of the members, Mr. Davis, of Floyd county, spoke of the 'rickety constitution under which we now live,' and he thought that the numerous requests for amendments that had come up at every session of the General Assembly were convincing proof that the people were dissatisfied. It was charged by some of the opponents of a new convention that it was only the 'Maine law faction as voiced in the late State temperance convention' and the 'unlamented remains of the Know-nothing party which desired to exclude foreign-born citizens from the polls' who were urging changes in the constitution. The opponents of a convention thought then, as they think now, that the plan of amendment provided in the constitution—the passage by two successive legislatures and submission to the people for ratification—was 'satisfactory, ample, safer, and more economical.' It was urged with force that before resorting to a new convention the amending method should be tested. By presenting propositions singly there would be less confusion and each reform could be more forcibly presented to the people. It was urged in reply that the amending process was 'utterly impracticable;' that 'competition for priority' had defeated every proposition so far presented, since no new amendment could be proposed while any amendment was pending.

The changes that were being urged at that time related to several matters:

1. The common school system was being retarded by the 'uniform law' provision of the constitution as interpreted by the State Supreme Court. The constitution imposes a duty upon the General Assembly 'to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all.' This was interpreted to require a proportionate uniform expenditure of revenue in all parts of the State. 'Nothing could be done anywhere in the State in advance of the progress of the darker portions.' The more enterprising and enlightened communities could not of their own accord provide more money for their schools than was provided elsewhere, but had to wait upon the more backward communities 'who were willing to close the files of progress.' This was a constant subject of irritation.

2. There was dissatisfaction over the election laws. A change was necessary to enable the General Assembly to pass a suitable registration law to prevent the colonization of voters and other frauds at the ballot box. The present system admitted 'whole shoals of immigrant voters' for want of power to fix a suitable residence requirement. Governor Ashbel P. Willard in his message of January 6, 1859, urged the passage of a law adequate 'to protect the suffrages of honest men against fraud. . . . Men have left the County of their residence; said Governor Willard, 'gone to others where they had no permanent homes, where they did not intend to remain longer than the day of election, have there cast their votes and thus determined who should be the officers and representatives of the counties they visited.' He called for severe penalties for such abuses.

3. Members objected to the technical and detailed legislative processes required by the constitution such as treating of but one subject in a bill, reading a bill three times, and especially objectionable was the provision for the amendment of laws. Many acts had been declared unconstitutional because they had not been set out in full in the amending process, as the constitution requires.

4. Others wished a restoration of annual sessions and a modified form of legislation for special and local purposes, and a constitutional change was especially desired to promote a betterment of conditions on behalf of temperance.

On March 5, 1859, the Governor signed a bill again submitting to the voters the question of calling a constitutional convention.

The question was to be voted on at the regular election in October, 1859. If a majority of the voters voted in the affirmative, then one hundred delegates were to be elected (one for each of the representative districts) on the first Monday in April, 1860. The convention was to assemble on the second Tuesday in May, 1860. Its proposed amendments were to be submitted to the people separately or together as the convention should determine. This proposal, coming so soon after the convention of 1851, was voted down by the people in the ensuing election.

Other proposals for a new convention were made in the General Asembly in 1871 and in the Special Session of 1872, and again in 1875, but they were not acted upon.

In 1879 a series of amendments were submitted to the voters:

1. To strike out the word 'white' from the suffrage requirements in order to bring the State constitution into conformity with the recently amended constitution of the United States; and to prescribe a residence of sixty days in the township and thirty days in the ward or precinct before voting; and to require that all voters be registered according to law.

2. To strike out the provision prohibiting negroes and mulattoes from voting.

3. To abandon the October election and to provide for holding all general elections in November; for holding township elections at such time as legislative acts may provide; to provide special elections for judicial officers; and to provide for the registration of all voters.

4. To strike out the word 'white' where it occurs as to enumeration of male inhabitants of the State for apportionment of senators and representatives.

5. To prohibit local laws as to fees and salaries, but providing graded compensation in proportion to population and services required.

6. To provide that the judicial power shall be vested in a supreme court, circuit courts and such other courts as the General Assembly may establish.

7. To strike out the negro exclusion and colonization clause and insert a provision to prohibit political and municipal corporations from becoming indebted to an amount in excess of two per cent of the taxable value of their property, except in case of war, foreign invasion, or other public calamity, and on petition of a majority of the property owners affected and in the discretion of the public authorities.

These amendments were approved by the governor on March 10, 1879, and were submitted to the voters on the first Monday in April (5th), 1880. They were all approved at the polls by majorities ranging from 17,000 to 50,000. But the highest vote received for any one of the amendments was 181,000, while the whole number of votes cast in the election was 380,000, the majority of which is one above 190,000. The last official enumeration of voters, taken in 1877 showed that there were 451,000 voters in the State and in the election of 1876, 434,000 votes had been cast. It will certainly be held reasonble to infer that there were as many in 1880, but the supreme court subsequently did not so infer. The constitution provides that in order to carry an amendment it shall be submitted to the electors of the State, 'and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.' Obviously none of these amendments had carried by a majority of the voters of the State, although each of them had a good majority of those interested enough to vote on the proposals. The governor had no power to declare whether the amendments had been rejected or adopted. The matter was submitted to the supreme court for decision, and the court held that the amendments were neither ratified nor rejected, the vote being ineffectual for want of a constitutional majority. Therefore, the amendments were still pending. But the court suggested that there would be no irregularity in submitting them, or any one of them, to the voters of the State at a special election, where only the amendments themselves could be voted on; and while it requires a majority of the electors of the State to ratify an amendment to the constitution, the whole number of votes cast at the election at which the amendment is submitted may be taken as the number of the electors of the State. (State *vs.* Swift, May term, 1880.)

This decision, or the indifferent vote on which it was based, gave rise to a demand for a constitutional convention, which repeatedly found voice in the ensuing General Assemblies, but without action. Instead, a special election for the amendments was resorted to. Following the suggestion thrown out by the supreme court, the General Assembly passed an act in 1881 providing for the submission of the foregoing amendments at a special election to be held on March 14, 1881. In this election none of the amendments received as many as 130,000 votes—but little more than one-fourth of the voters of the State—but they were declared adopted and were made part of the constitution of the State.[5] This was done by a judicial construc-

[5] The highest vote any amendment received was 128,731.

tion of the amending clause, by means of an assumption and a legal fiction which every member of the court knew to be untrue as a matter of fact. The majority of the electors of the State had not voted for the amendments—far from it; but the political power of the courts was equal to the emergency and the amendments by a forced construction were incorporated into the fundamental law. It may have been a desirable consummation, but it must be admitted that it was done in flagrant disregard of the plain provisions of the constitution. I admit that the amending provision of the constitution is absurd in the difficulties of its working, and we may be pleased to see a court disregard or circumvent it; but there is a more orderly and law-abiding way to abrogate the constitution among a law-loving people. The constitution is as plain as the English language can make it upon this point, but the court 'construed the constitution away' by assuming that there were no more voters in the State at the time of this election than had voted upon these propositions. By which it appears that the courts may amend the constitution easily enough, though the people may not. What the courts may do in the future in declaring amendments carried is uncertain and problematical.

Two amendments, one permitting an enlargement of the supreme court and another relating to the qualifications of lawyers, were submitted to the voters at the general election of November 6, 1900. The vote on the first was 314,610 for, and 178,960 against; on the second, 240,031 for, and 144,072 against, a majority of 135,000 in one instance and 96,000 in the other. But as the total vote cast for secretary of State was 655,000 and as the amendments required a majority of this vote (327,000) the court has ruled that they were not adopted, but are still pending. The State constitution says that while an amendment is pending, 'awaiting the action of the electors, no additional amendment shall be proposed.' This bars further action toward amending the constitution until these amendments are out of the way. An amended act again submitting them (at a special election) would require three years. Any new amendment would require three more years, since it must be agreed to by two successive General Assemblies. So if the pending amendments can be gotten out of the way and new amendments be gotten by two successive General Assemblies, and if the judgment and temper of the court should again be favorable, we might, with the best of expedition, hope to get a new amendment to the constitution by 1920.

The 'lawyer amendment' was again voted on by the people at the general November election of 1910. It received 60,357 votes for

adoption, to 18,494 against. Since there were 627,133 votes cast for secretary of State, it was clearly not adopted. There was no interest in it, but it is still held to be pending and is thereby blocking other amendments.

It is now contended that these amendments are not pending; that, failing to get a majority of the votes cast, they were rejected and are out of the way. Ex-president Harrison, I am informed, expressed an opinion to this effect. In re Denny,[6] decided in 1900, the court virtually reversed the ruling in the Swift case on this point. The Marion county Bar Association contended that the 'lawyer's amendment' had been passed in 1900, and it accordingly established rules and regulations requiring an examination for admission to the bar. One Denny contested the right of the bar to impose such a test and, while the Bar Association was sustained in the lower court, Denny was sustained by the Supreme court, which decided that the lawyer's amendment was not adopted but was rejected in 1900. Four successive General Assemblies since 1900 (1903, 1905, 1907, 1909) have approved the amendment for submission to the voters. The popular vote on the amendment in 1910 was about one-fifth of that in 1900, and, falling far short of a majority of the vote cast, it was not carried. Following the court's ruling in the Denny case one would suppose that the amendment was rejected but we are evidently left in doubt on that point (and as to what a future court will do with the amending provision) since in the case of Ellingham vs Dye in 1911 the court, in obiter dicta said: "Once again the General Assembly at its session in 1909 referred this amendment to the will of the voters at the general election in 1910, and once more it received the majority of the votes cast thereon but not a majority of the votes cast, at the election. And so it stands obstructive of further proposals for amendment, by reason of the provision of section 2 Article 16, while waiting definite action of the people." In their comments on the Ellingham-Dye case both the supreme court of Indiana and that of the United States recognized that in 1911 an "amendment was still awaiting the action of the electors" in this State. From these facts and conflicting rulings it appears obvious to the plain citizen that our constitution needs an overhauling in its amending process. Can the unworkable amending process be gotten rid of without a convention?

I can refer but briefly to the recent effort to give us what has been called the 'Marshall Constitution.' Instead of calling a constitutional convention, the usual process and agency for making a

[6] 156 Indiana, 104.

new constitution, the General Assembly under the control of the Democratic party legislative caucus, agreed upon a series of amendments proposed by Governor Thomas R. Marshall, for submission to the voters of the State for ratification or rejection. This act of the 67th General Assembly of March 4, 1911, purported to be a new constitution for the State. A citizen of Marion County, John T. Dye, brought suit in the Marion Circuit Court against Lew G. Ellingham, secretary of State, and the State election commissioners, enjoining said Ellingham from certifying for the election board this legislative act to the clerks of the counties, to prevent the election commissioners from placing a statement of the proposed constitution on the ballot to be voted at the next general election. Mr. Dye in his complaint contended that the act of submission was in direct violation of the existing constitution, which prescribes a definite way in which an amendment, or a series of amendments, shall be added to the constitution. When the mode of exercising the amending power is prescribed, then the power can be exercised in no other way. The people may form an original constitution, abrogate an old one and form a new one, without restriction except as restrained by the constitution of the United States, but if they undertake to add an amendment they must do it in the way laid down in the State constitution for its own amendment.

By the defendants it was contended that the act provided not a series of amendments but a new constitution; that the people were not limited as to the method of making a new constitution; that the General Assembly, since there were no specific limitation on this power, might prescribe the mode by which the people should exercise it. And even though the act in question should be considered as a series of amendments, since the constitution does not prohibit this method of submission, it would be a valid process.

Judge Remster, of the Marion County Circuit Court, in an able decision and after a full view of the case, decided that the legislative act of 1911 proposing the Marshall constitution was void, as being beyond the legislative power to draft a new constitution. (Dye *vs.* Ellingham.) Judge Remster held that this broad power of constitution-making is inherent in the people. It is not conferred upon the General Assembly, nor can the people divest themselves of it. The power to propose amendments is not a part of the general legislative power to be exercised where there is no specific limitation, at the discretion of the General Assembly; but it was so clearly and specifically stated, that it must be exercised in the way laid down in the constitution and only in that way. The conclusion

reached by Judge Remster was that the proposed constitution or amendments are void and nugatory, consequently the same in law as an act entirely unauthorized by law.'

This decision from an able and upright judge has quite generally been regarded as sound in law. This decision upon appeal was virtually sustained by the Supreme Court of the United States which held that it had no jurisdiction in the case.

This left the people of the State facing the two alternatives, whether they would seek reforms and amendments in their constitutional law by the slow and uncertain process of the present amending power, or resort to the more democratic, thorough, and speedier process of a constitutional convention. It is this question which the people are asked to decide in the referendum vote next November. The convention has long been regarded as one of the greatest of our political inventions, the greatest agency by which democracy finds expression. It is designed for the express purpose of 'formulating the public law, to secure the popular rights, and to subordinate powerful interests to the public welfare.'*

*I wish to acknowledge the invaluable help I have received from Mr. Charles B. Kettleborough, of the Legislative Reference Bureau, in preparing this paper.—JAMES A. WOODBURN.